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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/689,487	10/20/2003	Thomas W. Davison	ENDIUS.26CPIC2	7935
20995 7590 04/05/2007 KNOBBE MARTENS OLSON & BEAR LLP 2040 MAIN STREET FOURTEENTH FLOOR IRVINE, CA 92614			EXAMINER WOODALL, NICHOLAS W	
			ART UNIT	PAPER NUMBER
			3733	
SHORTENED STATUTORY PERIOD OF RESPONSE		NOTIFICATION DATE	DELIVERY MODE	
3 MONTHS		04/05/2007	ELECTRONIC	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Notice of this Office communication was sent electronically on the above-indicated "Notification Date" and has a shortened statutory period for reply of 3 MONTHS from 04/05/2007.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

jcartee@kmob.com  
eOAPilot@kmob.com

## Office Action Summary

**Application No.**

10/689,487

**Applicant(s)**

DAVISON, THOMAS W.

**Examiner**

Nicholas Woodall

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 18 January 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-48 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 18-23, 28, 31-36, 42-48 and 62 is/are rejected.
- 7) ☒ Claim(s) 24, 25, 29, 30 and 37-41 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 20 October 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>03/02/2007</u> . | 6) <input type="checkbox"/> Other: _____  |

**DETAILED ACTION**

1. This action is in response to applicant's amendment received on 01/18/2007.

***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 18-22, 26, and 42-46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Foley (U.S. Patent 5,792,044) in view of Ash (WO 8303189 A1).

Regarding claims 18-22, 26, 42, and 44, Foley discloses a system comprising an elongated body that can be usable with at least two fasteners (column 15 lines 3-20) and an elongated viewing element, which can be mounted to the elongated body (column 5 lines 51-65). The elongated body defines an access path between the proximal end and the distal end. Regarding claim 43, Foley discloses a device wherein the access path has a circular cross-section. Regarding claims 45 and 46, Foley discloses a device wherein the access path comprises a substantially enclosed passage. Foley fails to disclose a system comprising an elongated body that is expandable at the distal end at a first location. Ash discloses a device for use in minimally invasive surgical procedures that comprises an elongated body that is expandable at the distal end in order to provide viewing and operation room (page 2 lines 24-35). It would have been obvious to one having ordinary skill in the art at the

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time of the invention to manufacture the elongated body of Foley with an expandable distal end in view of Ash in order to provide viewing and operation room.

4. Claims 23, 27, 28, 31-36, 47, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Foley (U.S. Patent 5,792,044) in view of Ash (WO 8303189 A1) further in view of Mathews (U.S. Patent 6,033,406).

Regarding claims 23, 27, 28, 31-36, 47, and 48, the combination of Foley and Ash disclose the invention as claimed except for the fasteners being pedicle screws. Mathews teaches of a spinal fusion system for use in minimally invasive procedures, which contains at least two pedicle screws with a convex engagement surface in order to greatly decrease the risk of pin tract secretions, infections, or the potential of osteomyelitis (column 2 lines 9-10). It would have been obvious to one having ordinary skill in the art at the time of the invention to use the system of Foley modified by Ash with a spinal fusion system in view of Mathews in order to greatly decrease the risk of pin tract secretions, infections, or the potential of osteomyelitis.

#### ***Allowable Subject Matter***

5. Claims 24, 25, 29, 30, and 37-41 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

#### ***Response to Arguments***

6. Applicant's arguments filed 01/18/2007 have been fully considered but they are not persuasive. Regarding applicant's argument that the cannula of Foley is not large enough to permit the passage of multiple fasteners is not persuasive. The examiner

believes the cannula of Foley is capable of permitting the passage of multiple fasteners. The examiner believes that Foley discloses a cannula that permits the passage of a first fastener, Foley then discusses the cannula may be repositioned to another working site and a second fastener can then be passed through the same cannula. Therefore, Foley is capable of permitting the passage of multiple fasteners. There is no language in the claim requiring the multiple fasteners to be passed through the cannula together.

Regarding the applicant's argument that Foley teaches away from expansion of the distal end of the device is not persuasive. Regarding the applicant's argument that Foley discloses using multiple cannulas for procedures spanning across areas significantly larger than the cross-sectional area of the cannula and would require a cannula larger than the cannula discloses in Foley therefore resulting in increased tissue retraction and therefore teaches away from the combination is not persuasive.

First, Foley never specifically states in the disclosure that having an expandable distal end deviates from the scope of the invention. Furthermore, the combination of Foley and Ash does not require the initial size of the cannula of Foley to be enlarged, the combination only makes the distal end of the cannula capable of expanding after passing the distal end of the cannula through the incision in the skin in order to prevent the incision in the skin from enlarging and to permit the surgeon to view and operate on a larger area of the spine through the same sized incision. Lastly, Foley using multiple cannulas over a large area of the spine does not teach away from the combination of Foley and Ash. The combination would not hinder the use of multiple cannulas over a large area nor would the combination result in an increased amount of tissue retraction.

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7. Applicant's arguments, see pages 17-19, filed 01/18/2007, with respect to claims 24, 25, 29, 30, and 37-41 have been fully considered and are persuasive. The rejections of claims 24, 25, 29, 30, and 37-41 have been withdrawn. The examiner agrees with the applicant regarding applicant's argument that Matthews does not teach passing the fixation element, the fixation plate, through a cannula. The examiner agrees with the applicant regarding applicant's argument that Justis does not teach passing the fixation element, the fixation rod, through a cannula.

### ***Conclusion***

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. The new ground of rejection was presented due to the addition of new claims presented by the applicant. Furthermore, the previous grounds of rejection were only modified to remove the claims the examiner felt contain allowable subject matter after considering the applicant's arguments. The Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nicholas Woodall whose telephone number is 571-272-5204. The examiner can normally be reached on Monday to Friday 8:00 to 5:30 EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

NWW



EDUARDO C. ROBERT  
SUPERVISORY PATENT EXAMINER